

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant-Cross-
Appellee,

v

JESSIE B. JOHNSON,

Defendant-Appellee-Cross-
Appellant.

UNPUBLISHED

January 4, 2005

No. 249658

Oakland Circuit Court

LC No. 92-115814-FH

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right the consecutive sentences of five and one-half to thirty years imposed on defendant's plea-based convictions of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii). Defendant cross-appeals and argues that he was entitled to be sentenced under an amended version of MCL 333.7401. We affirm.

In February 1992 defendant was charged with two counts of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, an offense that carried a mandatory sentence of twenty to thirty years in prison. Defendant pleaded guilty, and the trial court sentenced him to consecutive terms of five to thirty years. In *People v Johnson (On Remand)*, 223 Mich App 170; 566 NW2d 28 (1997), another panel of this Court reversed and remanded, concluding that the trial court erred by considering a factor that was not objective and verifiable when departing from the mandated minimum terms.¹

On April 7, 2003 defendant again pleaded guilty of the charges. The trial court denied his request to be sentenced under an amended version of MCL 333.7401 that took effect on

¹ On remand, the trial court granted defendant's motion to dismiss the charges on the ground that he was entrapped. In *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2000 (Docket No. 219499), another panel of this Court affirmed the trial court's decision. In *People v Johnson*, 466 Mich 491; 647 NW2d 480 (2002), our Supreme Court reversed and remanded for further proceedings.

March 1, 2003. Instead, the trial court cited defendant's age, his lack of a prior record, his employment history, and his community service as substantial and compelling reasons for departing from the mandated minimum terms of twenty years, and sentenced defendant to two consecutive terms of five and one-half to thirty years with credit for 1,427 days served.

We first address defendant's cross appeal. 2002 PA 665, effective March 1, 2003, amended MCL 333.7401 to establish an entirely new offense and sentencing scheme. On cross-appeal, defendant argues that he is entitled to be resentenced under the amended statute.

We disagree. The amended statutory scheme applies only to offenses committed on or after March 1, 2003. *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004). Defendant must be resentenced under the version of MCL 333.7401 in effect at the time he committed the offenses, so the trial court ruled correctly.

At the time defendant committed the offenses, a trial court could depart from a mandatory minimum term if it found on the record that substantial and compelling reasons existed to do so. MCL 333.7401(4). A substantial and compelling reason for departing from a mandated sentence must be objective and verifiable and must irresistibly hold the attention of the court. *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). Appropriate factors for consideration include: (1) mitigating circumstances surrounding the offense; (2) the defendant's prior record; (3) the defendant's age; (4) the defendant's work history; and (5) post-arrest events, such as the defendant's cooperation with law enforcement officials. *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). We review the trial court's determination of the existence of a substantial and compelling reason for departure for clear error, the determination that the reason is objective and verifiable for error, and the determination that the reason constituted a substantial and compelling reason to depart from a mandated term for an abuse of discretion. *Fields*, *supra* at 77-78. After reviewing the trial court's analysis, we conclude that the trial court ruled properly.

The trial court carefully reviewed and reiterated numerous factors as reasons for departing from the mandated minimum terms:

All right. Whoever said this was a good job, I mean, it is a good job but that it's an easy job, I don't know. I - - I had the benefit - - before I go into the sentence - - of reading the numerous letters and submissions on both sides.

* * *

And before--the--the other point I want to make is that people have misconceptions in terms of what Judges do, don't do, can do, can't do. I mean, I - - I am bound by the rule of law the way any other person is. And the people who think I have unfettered powers to make things different when there's a sympathetic or a case that calls for empathy, such as the situation where the hidden victims of this are the five kids that are involved that may not have their father for- - for some period of time. Those are - - those are things that I just can't make go away.

And when I say that, I mean in the sense of, I really have two Mr. Johnsons to sentence today. The Mr. Johnson that went to prison and through a series of you know, machinations from the sentence being reversed to the entrapment being ultimately reversed. Some eleven years later, he stands before me at age forty-seven. The thirty-five year old Mr. Johnson clearly, in terms of his conduct, was bad man. He was a police officer. He was entrusted with protection of the public and he - - he absolutely disgraced that position. And that factor alone would have been to this Judge anyway, over - - very, very significant. And - - and I did read the transcript provided by the Prosecutor. And you know, clearly, who he was at the time was somebody who was engaged in criminal conduct. It was continuing conduct. And probably at that time I would have had a very, very weak case for any kind of deviation from the then mandatory minimum sentences.

Eleven years later, I look at Mr. Johnson and he did plead guilty before me not before any other Judge, so my responsibility in terms of sentencing rests with me. And I say to myself, who is this Mr. Johnson that now stands before me? He's obviously not been a police officer for a very long, long time. And under the *Fields* case, I can take post arrest conduct into consideration. And frankly, I - - I believe that I have before me a different man than the thirty-five year old Jessie Johnson.

You know, it reminds me of the - - of the film, "Dead Man Walking," where, you know, some I don't know how many years after the sentence - - after the crime, the Defendant was, in all intents and purposes a different kind of person but he still had to pay consequences for what he did. There were two lives lost and ultimately, he paid with his own life. Thus in this case, I can't ignore the fact that at very serious crimes occurred on - - by the Defendant so there's going to be consequence. The question is, to what degree? Do I follow the Prosecutor's position well set forth in her brief and at - - very astutely argued today as well and sentence him to the twenty plus twenty, meaning he'd get out of prison around eighty-five, eighty-six years of age, which with his condition is probably a life sentence or do I agree with the Defense that the - - Mr. Johnson today, his post-conduct indicates substantial and compelling reasons to deviate from the forty year minimum sentence.

And frankly, I am persuaded that there are substantial and compelling reasons to deviate from the forty year minimum sentence that I could impose even in spite of the fact that the thirty-five year old Mr. Johnson would probably not have received the kind of consideration in that regard.

Looking at the objectively verifiable factors, I do note that he stands before me forty-seven years of age with no criminal history. Although family support, I would agree, is not a factor which may be objectively verifiable, I do note that he's been responsible and it is really circumstantially supportive of the other evidence in this case. He's had a very stable employment history. He's employed by the Pontiac Schools, he's been a process server, he's worked for Crossroads for Youth as a youth specialist and - - and - - and - - and also the Pontiac School

District, as I indicated. That's objectively verifiable by the letters of support, which I'm going to incorporate by reference into my sentencing decision.

There's been extensive community involvement by way of volunteer activities, from tutoring students to working with the Salvation Army, with working with religious leaders to develop programs. And again, people that have observed and watched him for years have communicated to this Court that this isn't something that he's making up, that those are factors that are objectively verifiable and supported by - - in - - independent evidence.

Taking those factors into consideration, I find that there are objectively verifiable factors, then, to conclude in this Court's mind that there are substantial and compelling reasons to individualize this sentence and to deviate from the mandatory minimum of forty years. The question then becomes, what would be an appropriate sentence? And that's tough. Case law says that I have discretion in that regard. And looking at the guidelines that if I were sentencing him today, it - - it seems as if I have a range of choices because again, I don't believe I need to have the specific guidelines, it was just helpful for me to look at. The Defense argues, basically, the top of those guidelines would be sixty months or five years and the Prosecution argues that there would be a higher amount.

This man is forty-seven years old. He has done about as much as a person can do under the circumstances given, I suppose, the luck of having his sentence reversed and having his - - the entrapment placing him out of prison once that was resolved for a period of time. Come before this Court. So I've, you know, I thought about this and I thought about this. And knowing that this is going to be consecutive sentences, that he's not going to be getting any credit on the second case at all the Court has concluded that - - if you'll approach for as a minute.

* * *

All right. I'm going to impose sentence as follows. . . . Count one, five and a half to thirty with credit for one thousand four hundred and twenty-seven days. Count two, five and a half to thirty with zero credit since it is a consecutive sentence. For a total of eleven years. This Court feels that that's an appropriate sentence in the sense that that certainly is not an amount of time that any one of us would want to be away from our homes and our family and our loved ones and our community and that I believe sends as a message that this Court finds that what Mr. Johnson did when he was thirty-five was reprehensible and deserving of severe punishment. On the other side, by finding objective and verifiable factors to - - this Court does not feel that sentencing him in essence to death with a forty year sentence is appropriate. But the eleven years plus - - less the credit that he's already done, this Court feels is consistent with justice, protection of the community, and at the same time, taking into consideration the individuality of this Defendant.

We cannot conclude that the trial court clearly erred. Nor can we conclude on these facts that the trial court abused its discretion with his decision that these factors constituted a substantial and compelling reason for departing from the mandated minimum terms. *Id.* at 78.

We are mindful, of course, that sentencing departures must be the exception, whether the departure imposes a harsher or more lenient sentence than that of the sentencing guidelines. As defendant points out, “[t]he nature of a mandatory sentence does not divest a sentencing court of its ability and duty to set a fair sentence under the circumstances of an individual case.”

We agree with the trial court that this case is one of those rare exceptions. We note with some irony that since defendant was convicted of these crimes, the narcotics guidelines have been dramatically changed and now call for much lower sentences under many scenarios than they did when defendant was convicted. At sentencing defense counsel argues that the appropriate sentence for defendant under the amended guidelines would have been 36-60 months on one count and 24-40 on the other for a total of 60–100 months. Clearly, the sentence we are affirming today still far exceeds these guidelines.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens